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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

—v.—

BOWMAN TRANSPORTATION COMPANY, INC., *et al.*,

Respondents.

PETITIONERS' SUPPLEMENTAL MEMORANDUM

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JOHN R. MYER
Crosland, Myer, Rindskopf & Terry
2415 Nat'l Bank of Georgia Bldg.
34 Peachtree Street, N.W.
Atlanta, Georgia 30303

ELIZABETH R. RINDSKOPF
265 Church Street
New Haven, Connecticut 06510

Attorneys for Petitioners

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Petitioners submit this Supplemental Memorandum in response to the suggestion by Mr. Justice Blackmun at oral argument of this cause on November 3, 1975.

In *Tilton* v. *Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964), this Court held that Sections 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act (1948), 50 U.S.C. §§ 459(c)(1), (2) entitled a re-employed returning veteran "to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service." 376 U.S. at 181. The principle underlying that decision and others similar to it,[1] and which forms the basis of the pertinent statutory provisions, is that individuals in the statutorily protected group (veterans) should not be penalized in their seniority standing by their inability to have worked during their period of military service to the nation, 376 U.S. at 171.[2] Implicit in that principle, and explicit in other similar

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[1] See, e.g., *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) and authorities cited in Petitioners' main brief at pp. 37-38 and n.55.

[2] The Court noted that such legislation should be liberally construed to protect the intended beneficiaries, 376 U.S. at 181.

decisions,[3] is the concept that seniority dates based on actual employment periods are subject to modification in accordance with statutes giving rights to categories of employees whom Congress has chosen to protect for reasons of public policy.

Tilton presented a more complex situation than earlier returning-veteran cases, or than the instant case, because it involved a promotional problem in which an employee's progression depended on both seniority and completion of a helper (training) period, 376 U.S. at 172-3. Petitioners' case here presents no such complications: only the job of truck driver is involved, and once an employee is hired into such position his only progression is from lesser to greater seniority standing.[4] In any event, *Tilton* resolved such complications and attendant uncertainties in favor of the full seniority remedy for the protected category of employees.

Tilton supports petitioners' claim for retroactive seniority. Although it involved a grant of seniority to persons already employed before military service, the Congressional policy it recognized has also led this Court to approve agreements extending seniority rights to persons who had not, during the pertinent period, worked or even applied for jobs in which seniority was later conferred.

[3] See n.1, *supra*.

[4] Thus the "moving escalator" principle followed in *Tilton*, 376 U.S. at 174-5, is applicable only to the accumulation of employment date seniority Class 3 members would have had but for Bowman's discriminatory practices. That principle requires that class members be granted such seniority advancement.

Tilton also discusses the possible uncertainty of reconstructing the "but for" situation of the protected employees, 376 U.S. at 177-181, concluding that advancement should be assured if it was reasonably certain to occur (in foresight) and did occur (in hindsight), *id.* at 181. Since the only advancement of Class 3 members here would have been in seniority standing, and since such advancement was certain for any such person who has a retroactive claim—*i.e.*, who would have been hired absent Bowman's practices of discrimination—the *Tilton* test is met here.

Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953).[5] Title VII expresses a national policy no less urgent than that of the various post-World War II statutes protecting veterans' employment rights. The same remedy should be available here—one which does not subject employees in a protected group to permanently reduced seniority when Congress has determined that public policy favors their being made whole.[6]

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
10 Columbus Circle
New York, New York 10019

JOHN R. MYER
Crosland, Myer, Rindskopf & Terry
2415 Nat'l Bank of Georgia Bldg.
34 Peachtree Street, N.W.
Atlanta, Georgia 30303

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265 Church Street
New Haven, Connecticut 06510

Attorneys for Petitioners

[5] See discussion in Petitioners' main brief at 37-38.

[6] The make-whole remedy due Petitioners would, of course, include back pay for individuals who lost income because of their reduced seniority status. Thus, Bowman's counsel's statement at argument that the Company has little practical stake in the result here was apparently limited to considerations of who would be able to obtain what job assignments. Bowman does face monetary liability.